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IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 17

UNITED GAS PIPE LINE COMPANY,

Petitioner,

v.

MOBILE GAS SERVICE CORPORATION and FEDERAL POWER COMMISSION,

Respondents.

No. 31

FEDERAL POWER COMMISSION,

Petitioner,

v.

MOBILE GAS SERVICE CORPORATION.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR RESPONDENT, MOBILE GAS SERVICE CORPORATION

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ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR RESPONDENT, MOBILE GAS SERVICE CORPORATION

Questions Presented

1. Whether a contract to sell natural gas at wholesale at a special low rate for a fixed period of years which has been accepted for filing as the legal rate by the Federal Power Commission is binding upon the parties until and unless abrogated by the Federal Power Commission after a hearing and finding that it has become unreasonable and

against the public interest, or whether such a contract may be abrogated at any time by the selling company itself by the mere filing of a schedule of higher rates.

As presented by petitioners' briefs herein it is apparent that the answer to the above ultimate question depends upon the answer to the following immediate question: Whether Congress, in enacting the Natural Gas Act (a) declared all private rate contracts for the sale of natural gas to be against public policy and unenforcible, as contended by petitioner United Gas Pipe Line Company; (b) recognized duly filed private rate contracts as valid and binding but delegated its power to abrogate them to the natural gas company itself, as well as to the Federal Power Commission, as contended by petitioner Federal Power Commission; or (c) delegated its power to abrogate private rate contracts exclusively to the Federal Power Commission after a hearing and finding that the contract is against the public interest, as contended by respondent, Mobile Gas Service Corporation.

2. Whether, if Congress delegated its power to abrogate duly filed private rate contracts exclusively to the Federal Power Commission, that Commission can accept for filing and permit to become effective a proposed schedule filed by a natural gas company under Section 4(d) of the Act which increases the contract rate without the consent of the purchaser, in the absence of any hearing or finding that the contract rate is unreasonable and against the public interest.

3. Whether or not the increased rates illegally collected by a natural gas company pursuant to such a filing must be refunded to the purchaser.

Statement

The pertinent facts upon which the present controversy is based are fully and accurately set forth in the "statement" in the brief submitted by the Solicitor General.[1] To avoid needless repetition we will confine ourselves here to a brief outline of what we believe are the salient ultimate facts.

Respondent, Mobile Gas Service Corporation (Mobile), is a public utility under the laws of the State of Alabama. It purchases natural gas at wholesale from petitioner, United Gas Pipe Line Company (United), and distributes and sells it at retail to domestic and industrial consumers in Mobile, Alabama and the surrounding area (R. 8-9). Its purchases from United have at all times been made pursuant to a series of contracts specifying the rate which Mobile should pay for gas during the term of the contract (R. 9). The underlying contract was entered into by Mobile with a predecessor to United on January 1, 1936 (R. 81-86). After the enactment of the Natural Gas Act in 1938 this contract was duly filed with the petitioner Federal Power Commission (Commission) (R. 9). Until the attempted increase which forms the basis of the present litigation, no changes were made in such contracts without the consent of Mobile (R. 86-88, 88-90, 90-95).

The contract in existence in 1946 provided that United would supply Mobile's entire requirements of gas for industrial use at a rate of 90% of Mobile's gross revenues from its resales, provided this return was not less than 16¢ per MCF unless United agreed in writing to accept a lesser return (R. 9, 87).

In 1946 the Ideal Cement Company (Ideal) proposed to establish a cement plant in the City of Mobile, provided

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1. Commission's Brief, pp. 2-8. Hereinafter the Commission's Brief will be cited as "C. Br. p. ," and United's Brief as "U. Br. p. "

it could obtain a supply of natural gas for a ten-year period at a fixed rate of 12¢ per MCF (R. 9, 12, 39-40). This would have produced a return to United of less than 16¢ per MCF under the existing percentage agreement. Accordingly, in compliance with its contract, Mobile advised United of this proposal and requested its consent to the proposed low rate (R. 90-95). On July 30, 1946 United agreed in writing to supply Mobile with gas for resale to Ideal at a flat rate of 90% of its gross revenues, even though the resulting return would be less than 16¢ per MCF (R. 95). In reliance thereon, United entered into a contract to supply Ideal with natural gas for a period of ten years at a fixed rate of 12¢ per MCF (R. 90-95, 39-40).

In July 1952 the Federal Power Commission permitted a new tariff converting United's filed schedules and contracts from a percentage to a dollars and cents basis to become effective (R. 60). This so-called "conversion tariff" provided that sales to Mobile for resale to Ideal would be at a flat rate of 10.7¢ per MCF, which was precisely the amount of return which it had previously received under the pre-existing percentage rate. Thus, as recently as 1952, United was meticulous in honoring its contract obligations to Mobile.[2]

On June 24, 1953 United filed with the Commission a schedule of increases for a number of its sales, including an increase from 10.7¢ to 14.5¢ per MCF in its rate to Mobile for gas sold for resale to Ideal (R. 1, 11, 66-67). On July 10 the Commission ordered a hearing as to the reasonableness of the proposed new rate (R. 66-70),

2. On the oral argument in the court below counsel for United conceded that this contract was entered into in good faith, all parties believing that it would be valid and binding in accordance with its terms. Counsel asserted that at that time they had negligently failed to "go to the books" but that now United has discovered that the contract was voidable at will by United (Trans. of Oral Argument, 3rd Cir., p. 75). Thus, at least until 1952, United itself construed the Gas Act as we do here.

but did not suspend the effective date of the proposed increase to Mobile on the ground that Section 4(e) of the Natural Gas Act (52 Stat. 822; 15 U.S.C. 717(c)(e)) forbade the suspension of a schedule filed by a natural gas company changing rates for resale for industrial use only (R. 67, 69, 14). Thus the new rate became effective thirty days after filing, *i.e.* on July 25, 1953, and between that date and April 15, 1955, when the contract was assigned to United (U. Br. 7, fn. 5) Mobile has been compelled to pay 14½¢ per MCF to United for gas which it was obligated under its contract with Ideal to resell to it for 12¢ per MCF.

On July 16, 1953 Mobile filed its petition to intervene in the proceedings before the Commission (R. 70-72). On August 4, 1953 Mobile filed an amended petition (R. 7-18) requesting that the Commission's order of July 10 permitting the increase to go into effect as of July 25 be amended so as to reject the filing of the proposed increase to Mobile for resale to Ideal on the ground that it was in violation of United's contract with Mobile and therefore unlawful (R. 11-13, 17). Mobile also requested that if the Commission refused to reject United's filing, it order a hearing solely as to the lawfulness of such filing; that in addition it order United to repay to Mobile any part of the increased rates which might ultimately be found to be illegal (R. 17-18).

United filed a petition for leave to intervene and answer (R. 22-31). On December 7, 1953 the Commission issued an order which granted United leave to intervene but denied all of the relief requested by Mobile, dismissed Mobile's petition, and terminated the proceeding (R. 1-6). Mobile petitioned for a review of this order to the Court of Appeals for the Third Circuit.

The Commission's order was reversed by the Third Circuit on the ground that United was bound by its con-

tract with Mobile until and unless the Commission found after a hearing under Section 5(a) of the Act that the contract was unreasonable and against the public interest, that therefore United's attempt to increase the contract rates by a mere filing under Section 4(d) was unlawful, and that the filing should have been rejected by the Commission (215 F. 2d 883 (1954), R. 155-156, 139-155). This is an appeal by United and the Commission from that decision.

United's "statement" seeks to raise an additional issue that is not properly before the Court. It argues that compliance in 1952 with the order issued by the Commission requiring all natural gas companies to submit the conversion tariff above referred to (F.P.C. Order No. 144, issued October 30, 1948) in some manner affected the continuing validity of the contract (U. Br. pp. 5, 6). This contention was not raised before the Commission. Moreover, it is based on certain documents which were not a part of the record upon which the order under review was entered. United sought to have these documents added to the record by motion addressed to the Court of Appeals for the Third Circuit (R. 111-123), but that motion was denied (R. 139). Nevertheless, United saw fit to print some of these documents in an Appendix to its brief before the Third Circuit and they are included in the Record before this Court. It is respectfully submitted that neither those documents nor the issue based upon them are now properly before this Court.

In any event, we should like to point out that United's contention is directly contradicted by the Commission's own interpretation of the effect of its so-called conversion order:

> "The regulation neither requires that existing contracts remain in effect nor that they be changed. It is permissive only." (Federal Power Commission Order issued December 21, 1948, CCH Utilities Law Reporter, Federal Transfer Binder, 1947-1951 Decisions, Par. 9090.)

As the Solicitor General's brief correctly points out, the only effect of compliance with this "conversion order" was to change the rate which Mobile was obligated to pay United for the gas purchased for resale to Ideal from a percentage basis to the equivalent dollars and cents basis (C. Br. p. 4).

SUMMARY OF ARGUMENT

1. Unquestionably, Congress may abrogate private rate contracts when necessary in the public interest. This power may either be exercised by Congress itself, or it may be delegated by Congress to an administrative body, to be exercised in accordance with such standards as Congress may prescribe.

(a) In enacting the Interstate Commerce Act, Congress exercised this power itself by outlawing all rate contracts between carriers and shippers or passengers. *Armour Packing Co.* v. *United States*, 209 U. S. 56, 428 (1908). The reason assigned by this Court for holding that the Act outlawed contracts was that the filing provisions in the Act nowhere provide for the filing or publication of rate contracts. The word "contract" is not even mentioned in the filing provisions of that Act. By contrast, in enacting the Natural Gas Act Congress not only provided for the filing of all "contracts" (Section 4(c)) and of all changes in "contracts" (Section 4(d)), but expressly delegated to the Federal Power Commission the authority to abrogate existing "contracts" if they are

found after hearing to be unreasonable or unduly discriminatory or preferential (Section 5(a)). Thus it is apparent from the language of the Act itself that Congress did not outlaw rate contracts in the gas industry, but delegated its power to do so to the Federal Power Commission, on a finding that the public interest so required.

(b) The reason for the difference between the two Acts lies in the difference between the nature of the industries being regulated. As is conceded by both petitioners and was recognized by Congress, contracts are necessary in the natural gas industry because large investments or commitments must be made by industrial consumers and local distributing companies before their facilities can be converted to the use of natural gas. No such considerations apply in the railroad industry where the primary purpose of regulation is to prevent secret rebates and similar evils by compelling carriers to offer the same services at the same rates to all. The primary object of rate regulation in the utility field, on the other hand, is to obtain the lowest available rates for the consuming public.

(c) While United insists that the two acts are identical, the Solicitor General concedes that because of the difference in language and in the nature of the industries being regulated, the Natural Gas Act does not automatically outlaw rate contracts, but recognizes them as being "as valid, lawful and enforceable as they have always been" (C. Br. pp. 32, 52, 53).

(d) Nevertheless, both petitioners contend that Section 4(d) of the Gas Act authorizes a natural gas company, as distinguished from the Commission, to increase a contract rate by merely filing a new rate schedule. This contention is refuted by a mere reading of that section:

* * * * no change shall be made by any natural gas company in any * * * contract * * * except after thirty days notice to the Commission and to the public", to be given by filing with the Commission a schedule showing the changes to be made. Thus this section merely prohibits parties to a contract from changing the contract rates without notice to the Commission or to the public. It cannot be tortured into an affirmative grant of power to one of the parties to the contract to abrogate it unilaterally. If it had this effect, it would mean either that such contracts were void *ab initio* for lack of mutuality, or that Congress had delegated its power to abrogate contracts to one of the parties to the contract.

(e) Petitioners' contentions are based upon a misconception of the nature of the "filed rate procedure" embodied in the Act. A "reasonable rate" is not a fixed mathematical point, but a zone bounded at the top by a rate which will produce a fair return to the company on its investment. While the Commission may not impose a lower rate upon a company, the company is under no obligation to maintain the maximum rate permissible by law. The lower boundary of this "zone of reason" is the lowest rate at which the company offers to serve its customers, provided such rate is neither unduly discriminatory or preferential. Any rate filed by a company, whether embodied in a contract or in a unilateral rate schedule, which falls within this zone must be accepted by the Commission under its duty to approve "the lowest reasonable rates" (5(a)). If such a rate later becomes either exorbitant or unduly discriminatory or preferential, the Commission as the guardian of the public interest may hold hearings either upon the complaint of a party injured by the existing rate, or on its own motion, under Section 5(a). If upon such a hearing the rate is found

to be injurious to the public interest, it must be set aside by the Commission. And this is so regardless of whether or not the rate is embodied in a contract. Thus the public interest is amply protected against unreasonable or otherwise injurious contracts. But an existing rate may not be set aside under 5(a) as long as it remains within the "zone of reason". It is thus apparent that the existence of private rate contracts can in no way interfere with a proper exercise of the regulatory powers of the Commission as prescribed by the Gas Act.

2. It follows from the foregoing that a natural gas company may not file a schedule of increased rates under Section 4(d) when the existing rates are embodied in a contract, without the purchaser's consent. If it could do so, it would have the power to abrogate its contract unilaterally without any finding that it was injurious to the public interest. Consequently, the Commission must reject such a filing. For if such a filing is not rejected by the Commission, it automatically becomes the "legal rate" and cannot thereafter be set aside unless the *new* rate itself is found after a hearing under Section 4(e) to be exhorbitant or otherwise unreasonable. If the new rate is within the "zone of reason" it must be approved by the Commission even though the contract rate itself is also within the "zone of reason". For the Commission has no authority in a hearing under Section 4(e) to reject a rate accepted for filing under 4(d) except upon a finding that the *new* rate itself is unreasonable. The Commission may not consider the reasonableness of the existing rate on such a hearing. It follows that an attempt by a company to file a change in a contract rate without the consent of the purchaser must be rejected by the Commission as illegally filed. If the Commission does not reject the filing, there is no way to prevent the rate from becoming effective and thus permitting the company by its unilateral act to abrogate its own contract.

3. The issue is one of statutory construction and must be determined primarily from the language of the statute itself read in the light of the congressional purpose, rather than from cases arising under different statutes and in other jurisdictions. Nevertheless, so much space is devoted by petitioners to the citation and discussion of an aggregate of over 175 cases in an effort to show that the "overwhelming" weight of authority supports their contentions, that we believe it is necessary to discuss the authorities with some care, in order to demonstrate the utter fallacy of such a contention.

(a) An examination of the decided cases will show that the only time this issue has been squarely presented to this Court under a State statute containing filing provisions substantially similar to those contained in the Natural Gas Act it expressly rejected the proposition that a contract rate may be increased by a mere filing of a new schedule. *Wichita R. R.* v. *Pub. Util. Comm.*, 260 U. S. 48 (1922). Petitioners cite no cases which distinguish or in any way limit the application of this decision to the case at bar. Despite immaterial and minor differences in the statutes, the principles enunciated in that case are equally applicable to the Gas Act, and clearly support the contentions heretofore advanced. Moreover, those principles have been expressly applied to the Natural Gas and Federal Power Acts by the Courts of Appeal in the Third, District of Columbia, and Tenth Circuits.

(b) The decisions of this Court cited by petitioners are clearly distinguishable. The *Armour* case, *supra*, as well as many of the other cases cited, deal with the Interstate Commerce Act, which concededly outlawed all rate contracts in the railroad industry and therefore have no application here. *Union Dry Goods Co.* v. *Georgia Public*

Service Co., 248 U. S. 372 (1919), cited as "controlling" in the brief submitted by United, merely upholds the right of the State Commission of Georgia to set aside contracts upon a finding, after a hearing, that they are discriminatory or preferential. *Midland Realty Co.* v. *Kansas City Power & Light Co.*, 300 U. S. 109 (1937), relied on by both petitioners, sustains the proposition that, because the Supreme Court of Missouri has held that rate contracts in the utility business are unconstitutional in Missouri, rates embodied in such a contract may be changed by a mere filing of a new rate schedule. Thus it has no more bearing on the present issue than the *Armour* case.

(c) An examination of the cases arising under State utility statutes shows that they fall into two groups: those dealing with statutes that have been construed by the State Courts as automatically outlawing rate contracts, as does the Interstate Commerce Act, and those which recognize the validity of contracts under the state statute. The former are irrelevant. Of the latter, only two have been construed as permitting a contract rate to be changed by a mere filing of a new rate schedule. The great majority follow the principles enunciated by this Court in the *Wichita* case and expressly reject the contention that a rate contract can be changed by the mere unilateral filing of a new rate schedule.

(d) An examination of the Commission's past practices shows that, except in the instant case and the *Sierra* case, the Commission has consistently permitted contract rates to be changed only after a finding of unreasonableness after a hearing under Section 5(a).

4. There is no merit to United's contention that it should be permitted to retain the excess charges illegally collected from respondent.

ARGUMENT

I

Private rate contracts are recognized by the Natural Gas Act and are valid and binding as between the parties unless and until set aside by the Federal Power Commission after a hearing and finding under Section 5(a) that they are unreasonable.

No citation of authority is required to establish the proposition that private rate contracts are subject to the paramount power of government to regulate all rates. Like any other private contracts, they may be modified or abrogated by the Federal or State Governments when the public interest so requires. Nor is the citation of authority required to establish the proposition that this power may be exercised in only two ways: (1) by the legislature itself acting directly, as in the Interstate Commerce Act (*Armour Packing Co.* v. *United States*, 209 U. S. 56, (1907)), or (2) by an administrative body to which the legislature has delegated the power, as in the Public Utility Law of the State of Kansas (*Wichita R.R.* v. *Pub. Util. Comm.*, 260 U. S. 48 (1922)). Moreover, when the legislature delegates the power to an administrative body, it can only be exercised in accordance with the standards and subject to the limitations prescribed by the legislature. Indeed, the legislature may not delegate such a power without prescribing standards governing its exercise (*Wichita R.R.* v. *Pub. Util. Comm.*, 260 U. S. 48, at 59).

The present controversy arises primarily from a failure of the petitioners to bear these basic principles and distinctions in mind in construing the Natural Gas Act. United insists that there is no difference whatever between the Interstate Commerce Act and the Natural Gas Act and

that private rate contracts are therefore outlawed in both. The Solicitor General, on the other hand, although conceding that rate contracts are not outlawed by the Gas Act, nevertheless contends that the *Armour* case is controlling and that rate contracts can therefore be abrogated by the unilateral action of the natural gas company itself, without any finding of unreasonableness by the Commission. We think it is indisputable that rate contracts are valid under the Gas Act.

A. It is clear from a comparison of the two statutes that the Natural Gas Act does not outlaw rate contracts, whereas the Interstate Commerce Act does.

The basic difference between these two types of statutes is well illustrated by the opinion of this Court in the *Armour* case itself (209 U. S. 56 (1908)). That case was an appeal from a conviction for violation of the Elkins Act (Act of February 19, 1903, c. 708; 32 Stat. 847, U.S.C.A. Title 49, §§41-3) by entering into a private unfiled rate contract for the transportation of goods in interstate commerce at rates lower than the publicly filed rates. Armour defended on the ground that it was carrying out the provisions of a legal contract. In support of its determination that the contract was illegal under the Interstate Commerce Act, this Court pointed out that the principal purpose of the Act was "* * * to require all shippers to be treated alike, and but one rate to be charged for similar carriage of freight, and that the filed and published rate, equally known by and available to every shipper" (209 U. S. 56 at 80). Mr. Justice Day continued:

> "* * * There is no provision [in the Interstate Commerce Act] for the filing of contracts with shippers and no method of making them public defined in the statute. If the rates are subject to secret alteration by special agreement then the statute will fail of its purpose to establish a rate duly published, known to all, and from which neither shipper nor carrier may depart. * * *

> Any other construction of the statute opens the door to the possibility of the very abuses of unequal rates which it was the design of the statute to prohibit and punish." (209 U. S. 56 at 81)

Thus it is clear that private rate contracts are outlawed in the railroad industry. In discussing Armour's suggestion that as a matter of policy rate contracts should not be outlawed the Court said:

> "* * * It may be that such contracts should be recognized, giving stability to rates for limited periods; *that the contracts being filed and published, and the rate stipulated known and open to all, no injustice would be done.* But, as we have said, such considerations address themselves to Congress, not to the courts." (209 U. S. 56 at 82) (Italics added.)

We suggest that these considerations did address themselves to Congress when it was enacting the Natural Gas Act, as well as the Federal Power Act[3] (Act of June 21, 1938, c. 556, 52 Stat. 821 *et seq.*, U.S.C.A. Title 15, §717, *et seq.*) Whereas in the corresponding provisions for the filing of rates to be charged to passengers and shippers in the Interstate Commerce Act the word "contract" is never once mentioned (See C. Br. pp. 107-113),[4] the Gas and Power Acts both expressly require that all "contracts" affecting rates be filed with the Commission (Gas

3. Everything said here about the Natural Gas Act, with a few minor exceptions which will be noted, is equally applicable to the Federal Power Act, which is substantially identical in terms so far as the present issues are concerned. *Federal Power Commission* v. *Sierra Pacific Power Company*, No. 51, this Term, and its companion case, *Pacific Gas and Electric Company* v. *Sierra Pacific Power Company*, No. 53, this Term, hereinafter referred to as "the Sierra case" or "Sierra", arose under the Power Act.

4. It is significant that in the case of contracts between common carriers for joint through rates, which are not outlawed by the Commerce Act, the Act expressly provides in Section 6(5) that such contracts must be filed. It is also apparent from this Court's opinion in *Kansas City So. Ry.* v. *Albers*, 223 U. S. 573 (1912), that such contracts are valid and binding as between the parties provided they are duly filed as required by Section 6(5).

Act, Section 4(c), Power Act, Section 205(c)), that no "contracts" affecting rates may be changed without due notice by filing (Gas Act, 4(d), Power Act 205(d)), and that the Commission may, upon a hearing and finding that any "contract" affecting rates is injurious to the public interest, set the same aside and order reasonable rates and "contracts" to be thereafter observed (Gas Act, 5(a), Power Act, 206(a)). The text of these provisions is set forth in full at pages 101-107 of the Commission's brief.

In other words, Congress in enacting the Gas and Power Acts not only gave heed to the suggestion made by this Court in the *Armour* case, 209 U. S. 56 at 82 (1907), but provided for the very same filing procedure which it had in the Interstate Commerce Act in respect to contracts between common carriers for joint through rates, which are expressly permitted under that Act. Thus it is quite apparent from the language of the Gas and Power Acts themselves that in enacting them Congress did not directly exercise its power to abrogate private rate contracts, as it had done in the case of contracts between carriers and shippers in enacting the Interstate Commerce Act, but, on the contrary, expressly recognized the continuance of such contracts in the natural gas and electric industries, and delegated its power to abrogate or modify them to the Federal Power Commission upon a finding, after hearing, that the public interest so required.

B. The difference between the Natural Gas Act and the Interstate Commerce Act is due to the difference in the nature of the industries being regulated: Whereas contracts are not necessary in the railroad industry, they are essential in the gas industry, as Congress recognized and as both petitioners concede.

We could not set forth the reasons underlying the differen between the Interstate Comerce Act and the Gas

Act more cogently and succinctly than does the Solicitor General at pages 53-55 of the brief submitted by him on behalf of the Commission. Accordingly, we beg leave to quote that exposition in full and adopt it as our own: After pointing out the difference in language between the two Acts to which we have just referred, the Solicitor General states, at pages 52-3:

> "The difference in language and Congressional policy regarding rate contracts [between the Gas and Commerce Acts] is explicable by the dissimilarity in nature of the industries being regulated. Railroads transport innumerable kinds and quantities of goods for many persons between various points on their lines and facilities must be available for all patrons. The Commerce Act's purpose to require uniform treatment of shippers could best be accomplished by requiring compliance with schedules of general applicability; permitting private contract rates would make even more complex the already elaborate railroad rate structure and, by the sheer weight of numbers, make the administrative burden unmanageable, with the result that the private contract would provide an easy way to circumvent the Commerce Act's prohibition against discrimination. Cf. *New Haven Railroad Company* v. *Interstate Commerce Commission*, 200 U. S. 399.
>
> "The very large number of retail transactions involved in railroad rate regulation present an entirely different administrative problem from the relatively few wholesale interstate transactions regulated by the Gas and Power Acts. *The latter typically require substantial investment in capacity and facilities for the service of the particular customers. Consequently, gas and power companies' relations with their customers are ordinarily first arranged by contract* and, because of the limited numbers of purchasers, control over the rates embodied in these contracts apparently was not expected to create a substantial administrative burden

or to frustrate the prohibitions against preferential rates." (Italics added)

United also, although disagreeing with the Solicitor General's concession that the two Acts are dissimilar, has expressly conceded that binding contracts providing for "firm" rates are necessary if the natural gas industry is to flourish and grow. The Court will recall that both Petitioners referred in footnotes in their briefs[5] to the fact that since the decision below Mobile and United have entered into an agreement whereby Mobile assigned a number of its contracts for resale for industrial use, including the Ideal Cement Company contract here in issue, to United. Under the arrangement resulting from this assignment United now sells its gas directly to these industrial customers and Mobile receives a fee of 2¢ per MCF for transporting and distributing the gas for United's account. This agreement was approved on April 15, 1955 by the Federal Power Commission after a hearing. The stated purpose of this transaction was to convert the sales covered by those contracts into direct sales by United to Ideal and the other industrial consumers whose contracts were assigned, because such direct sales are not subject to regulation by the Commission (Gas Act, Section 1(b)). At the hearing before the Commission on the assignment of these contracts, Mr. Crymes Pittman, who is in charge of sales of gas by United in the Jackson District, which included Southern Alabama, was called as a witness by United. He first testified that several of Mobile's resale industrial customers whose contracts had expired had, after United's successful repudiation of its contract to supply Mobile for resale to Ideal, refused to enter into new contracts because of Mobile's apparent inability to quote firm rates (pp. 14-15). Mr. Crymes Pittman then testified as follows (pp. 20-21):

5. C. Br. Note 5, pp. 7, 8; U. Br. Note 10, pp. 12, 13.

"Q. What is the objective United wishes to accomplish with regard to industrial rates in the Jackson Zone? A: United has found over a long period of time that it can better serve the public at large by selling large volumes of industrial gas. By selling large volumes of industrial gas, United is able to sell gas to its general service customers at less cost. * * *

This proceeding seeks a solution to the fundamental problem presently encountered in the sale of gas to industrial customers. Such customers are normally willing to install the necessary facilities to burn gas and thereafter to purchase gas only when two conditions are met: first, that the cost of gas be no higher than competitive fuels; and second, that the cost of that gas be fixed by contract for reasonable periods of time.

Because the rates to distributors are subject to regulation and change, the distributors are unable to safely quote long-term rates for industrial gas. This condition, a major obstacle to industrial sales, could be effectively eliminated by permitting the pipe line company, that is, United to contract directly with the industrial customer."[6]

Having thus demonstrated the vital importance of binding rate contracts in the gas industry, one would have expected United to rest content with the decision below, as that decision expressly holds that distributors *are* able to quote "long-term rates for industrial gas" and offer contracts which will be valid and binding in accordance with their terms, as long as they remain "reasonable". Yet United insists that no such binding contract may be entered into, however beneficial to the gas industry it might be.[7]

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6. Official Stenographer's Report, pp. 20, 21, *In the Matter of United Gas Pipe Line Company*, Docket No. G-6060 (F.P.C., March 4, 1955).

7. United's purpose in seeking a reversal of the decision below and then entering into the assignment contract is particularly difficult to understand in view of the fact that under the assignment contract United receives less for

It is also apparent from the somewhat scanty record of legislative history that has been found by the parties hereto that the necessity of contracts in industrial sales in the gas industry was fully recognized by Congress at the time the Act was adopted. Thus, in explaining the purpose of the amendment to Section 4(e) of the Act which added the prohibition against the suspension of proposed new rates for sales of gas for resale for industrial use only, Congressman Lea, Chairman of the Interstate and Foreign Commerce Committee of the House and sponsor of the Act said:

> "* * * The effect of [this proposed amendment] is to prevent suspension in cases of industrial use *where there are short-term contracts* for the supply of gas for industrial use only."[8] (Italics added.)

Thus, it is indisputable that when Congress adopted the Natural Gas Act it recognized the fact that rate contracts were customary in the gas industry, and would continue to exist after the passage of the Act. Moreover, this is expressly conceded by the Solicitor General (C. Br. 41).

C. The Solicitor General concedes that under the Natural Gas Act private rate contracts remain "as valid, lawful and enforceable as they have always been".

United persists in ignoring the consequences of the difference in language between the Interstate Commerce and Gas Acts and insists that they are identical. By so doing, United has greatly simplified the presentation of its principal contention: That, as the Commerce Act con-

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the gas sold to Ideal than it did under the contract here at issue; for it will be recalled that under that contract United received 10.7¢ per MCF for gas sold to Mobile for resale to Ideal, to whom it was resold at 12¢ per MCF. Under the new agreement United receives 12¢ per MCF directly from Ideal but pays Mobile 2¢ per MCF for transportation. Thus United has agreed to receive .7¢ less per MCF under this new arrangement than it did under the contract which it seeks to abrogate in the instant proceeding for rendering the identical service.

8. Vol. 81, Part 6, 75th Congress, 1st Session, page 6727, Congressional Record July 1, 1937.

cededly outlaws rate contracts, the Gas Act, being identical, does too.

The Solicitor General takes a more realistic view. He concedes that, because rate contracts are necessary in the natural gas and power industries, "Congress recognized contracts in the natural gas and utility fields" (C. Br. pp. 52-53). And at page 32 he, quite correctly, asserts:

> "* * * private rate contracts, far from being 'automatically abrogated' by the Gas Act, are specifically envisaged as continuing to be made and to be enforced (see *infra*, pp. 51-55); they are as valid, lawful and enforceable as they have always been" (C. Br. p. 32).

Having thus conceded the basic principle on which the decision below rests, one would suppose that the Solicitor General might appropriately have confessed error; for surely if a private rate contract is valid and enforceable, it may not be set aside by the unilateral action of one of the parties to that contract. Surely it can only be abrogated by the Commission itself upon a finding of unreasonableness. However, the Solicitor General seeks to avoid this inescapable conclusion from his concession by the following somewhat startling assertion:

> "In short, while Congress recognized contracts in the natural gas and electric utility fields, it had no purpose to endow them with a special status or greater dignity than other forms of rates; on the contrary, its aim was merely to eliminate, for the new legislation, the Commerce Act's prohibition on contracts and to give them the same status and the same dignity as the other forms of rates—to lift contracts to par, not place them on a higher plane." (C. Br. p. 53)

It would seem that a mere reading of this assertion would carry its own refutation. We submit that a docu-

ment which can be abrogated at will by one of its signatories has not even enough "dignity" to be denominated a "contract." As we shall see in a moment, the arguments advanced in support of this novel doctrine are clearly untenable.

D. Section 4(d) does not authorize a natural gas company to file a proposed rate increase in violation of its duly filed contract.

Both Petitioners base their contentions upon what they describe as the "filed rate procedure" embodied in Section 4 of the Act. Specifically, they insist that Section 4(d) affirmatively authorizes a natural gas company itself to file rate changes unilaterally regardless of whether or not the rate is embodied in a contract. We find no such authorization, either in Section 4(d), or anywhere else in the Act.

Section 4(d) merely requires that "no change shall be made by any natural gas company in any such [*i.e.* duly filed] rate * * * or contract relating thereto except after thirty days' notice to the Commission and to the public," such notice to be given by filing with the Commission a schedule of the changes (C. Br. 101). How can these words of prohibition be tortured into an affirmative grant of power to a natural gas company to abrogate an existing duly filed and enforceable rate contract by its unilateral act? Far more explicit and affirmative language is required to produce such an incongruous result. *Federal Power Commission* v. *Niagara-Mohawk Power Corp.*, 315 U. S. 575 (1954).

We submit that the members of Congress who enacted this statute must be deemed to have had sufficient learning in the law of contracts to recognize that no change may be made in any valid and existing contract without the consent of both parties. As this Court pointed out in the

Wichita case (260 U. S. 48 at 56-7 (1922)), discussed more fully hereinafter (pp. 34-39), the only purpose and effect of such a provision for the filing of proposed changes in contracts is to add the further requirement that any such change is subject to public scrutiny and review by the Commission. Thus rate contracts are placed on a "par" with other rate schedules only to the limited extent of providing that no changes in rates, whether fixed by contract or by filed tariff, can be made without due notice to the Commission and to the public—thus complying with this Court's suggestions in the *Armour* case (209 U. S. 56 at 82 (1907)). Section 4(d) has no bearing on the rights of the parties to the contract *inter sese*.

Moreover, to suggest that Congress by this language intended to grant the power to file unilateral changes in rate contracts to a natural gas company is to impute to Congress an intent either to outlaw contracts altogether, which the Solicitor General concedes it did not do, or to delegate its legislative power to abrogate contracts to one of the parties to the contract, which clearly it had no power to do. For concededly, the only issue before the Commission in a hearing under Section 4(e) is the reasonableness of the proposed new rate.[9] The reasonableness of an existing rate can only be reviewed under Section 5(a). Thus under petitioners' construction, a natural gas company which, in order to attract new business or meet competition, has entered into and filed a contract to sell gas at a special low rate could abrogate that contract at will by merely filing a new schedule of higher, but still "reasonable" rates. For the Commission could not reject such a rate under Section 4(e), as it would not be "unreasonable".

"Contracts" which can be voided at will by one of the signatories are clearly not "as valid, lawful and enforce-

9 C Br 22 U Br 52

able as they have always been", as the Solicitor General concedes that rate contracts are under the Gas Act (C. Br. p. 32). On the contrary, such a contract would be void *ab initio* for want of mutuality. But this Court has held that the existence of the regulatory power of Government does not render contracts void for want of mutuality: In *Southern Utilities Co.* v. *Palatka*, 268 U. S. 232 (1925), the city of Palatka sought to restrain a utility company from charging a higher rate than that contained in an existing franchise. The State courts granted the injunction and on appeal to this Court the utility company urged that the contract was void for lack of mutuality because the city had conceded that the legislature could regulate the rates. In disposing of this argument and sustaining the State courts, Mr. Justice Holmes writing for a unanimous court said:

> "* * * The argument cannot prevail * * * it is perfectly plain that the fact that the contract might be overruled by a higher power does not destroy its binding effect between the parties when it is left undisturbed. *Georgia Railway & Power Co.* v. *Decatur*, 262 U. S. 432, 438. *Opelika* v. *Opelika Sewer Co.*, 265 U. S. 215, 218. Such a notion logically carried out would impart new and hitherto unsuspected results to the power to amend the Constitution or to exercise eminent domain." (268 U. S. 232 at 233)

According to the Solicitor General's conception of the "filed" rate procedure," the "higher power" which can overrule an existing and concededly binding contract is the natural gas company itself, acting under Section 4(d). In other words, his argument rests on the clearly untenable proposition that Congress delegated its power to determine when the public interest required a private contract to be set aside to one of the parties to the contract.

E. The existence of private rate contracts which are binding unless found unreasonable by the Commission in no way interferes with the proper functioning of the "filed rate procedure" embodied in the Act.

Petitioners' contentions that the existence of binding contracts would in some manner interfere with the proper functioning of the regulatory system embodied in the Act by limiting either the power of the Commission to regulate rates or the "duty" of companies to propose increases from time to time, are based upon a misconception of the true nature of that system.

Concededly, it is not the Commission, but the natural gas company which is charged in the first instance with the duty of proposing and filing all rates under Section 4(c) and all changes in rates under Section 4(d). The primary function of the Commission is not to fix rates, but to review all existing rates (under Section 5(a)) and all proposed changes in rates (under 4(e)), and determine whether such rates are "just and reasonable." It is only when the Commission has found after a hearing that such rates are unreasonable that the Commission itself has any authority to fix rates. Its power to do so is not hampered in the slightest degree by the existence of contracts. On the contrary, the Act itself prescribes precisely how and when that power may be exercised to abrogate unreasonable contracts.

Nor is a natural gas company under a "continuing mandatory duty" to propose changes from time to time. United's elaborate arguments in support of that contention (U. Br. pp. 29, 46) overlook the fact that a "reasonable rate" is not a mathematical point, but a zone:

> "A 'reasonable rate' is not a particular decimal. A 'reasonable rate' is one that falls within the zone of reason; it is a field, and not a mathematical point. * * * A finding that a particular rate is

> reasonable is not, therefore, a finding that every other rate is either unreasonable or confiscatory." *Wichita Gas Co.* v. *Public Service Commission*, 2 F. Supp. 792 at 799 (D. C. Kan., 1933), modified, 290 U. S. 561, (1934).

See also, *Washington Gas Light Co.* v. *Baker*, 88 App. D. C. 115, 188 F. 2d 11 (1950), cert. denied, 340 U. S. 952, (1951).

The "zone of reason" is bounded at the top by a rate which will produce a fair return on its investment to the company—although even such a rate "is not capable of exact mathematical demonstration." *United Railways & Electric Co.* v. *West*, 280 U. S. 234, 251 (1930). But any rate proposed by a company which will produce more than a "fair return" must be set aside by the Commission as exorbitant. Conversely, any rate imposed by the Commission to replace a rate found to be exorbitant which will produce less than a fair return will be set aside by the courts at the instance of the company as confiscatory.

But this does not mean, as petitioners seem to contend, that rates which will produce a full "fair return" are the only "reasonable rates" permissible under the Act, and that therefore a natural gas company must be at all times free to propose, or is obligated to propose, changes in its rates so as to keep them at that level. A company is under no obligation to propose or maintain only rates which will produce the maximum return to which it is legally entitled. The company's management is the guardian of the company's stockholders, not of the public interest. It is the Commission's primary concern to protect the public interest and see that consumers at all times are charged only the "lowest reasonable rates" available (Section 5(a)). Thus if the company, for its own business purposes, such as to meet com-

petition or attract new business, proposes a non-discriminatory and non-preferential rate which produces less than a fair return, the Commission must accept such a rate. For it is not "unreasonable" unless it is unduly preferential or discriminatory. If it meets those tests, it is "the lowest reasonable rate", and it must be approved by the Commission.

This proposition is well illustrated by the action of the Commission in the *Sierra* case (No. 51 and No. 53, this Term). There the company had filed a schedule of new rates which, while higher than the contract rate, would still produce a return of only 4.75%, although it was stipulated on the record and accepted by the Commission that 5½% was a reasonable rate of return (Record in Nos. 51 and 53, p. 464). In approving the proposed new rate the Commission in its order said:

> "It is apparent that P.G.&E. [the selling company] regards the deficiency of the .75 of a percentage point as warranted in order to attract and retain this particular business in the face of the alternatives that may have been available to Sierra." (Record in Nos. 51 and 53, p. 465.)

After pointing out that P.G.&E. would lose a substantial investment if it lost Sierra's business, and that it affirmatively appeared that this deficiency from a reasonable rate of return was not offset by any excess return on sales to other purchasers, the Commission concluded:

> "This, and the fact that no undue discrimination nor preference results from the deficiency, as we have already seen, makes clear that the proposed rate is not unreasonable and is lawful." (Record in Nos. 51 and 53, pp. 465-6.)

Thus, the lower limit of the "zone of reason" is any rate at which the company offers to sell its gas, and which

is neither preferential nor discriminatory. Any rate or contract providing for a rate which falls within that "zone of reason", must be approved by the Commission. For it may only reject a duly filed rate after a finding that it is unreasonable.[10]

It follows also that a rate embodied in a contract which has been duly filed and permitted to become effective by the Commission remains the legal rate for the duration of the contract provided it does not become so unreasonable as to injure the public interest. For the company is bound by its contract not to increase it and the Commission may not do so unless it is found to have become unreasonable.

Both petitioners complain that if a natural gas company cannot resort to the filing procedure under 4(d) to increase a contract rate, it cannot itself abrogate its contract at all because if is not one of the organizations authorized to initiate a proceeding under Section 5(a) in order to have it reviewed by the Commission. But why should it? The contract must have been considered reasonable by the Commission when entered into and filed, else it would not have been permitted to become the effective legal rate. Congress no doubt assumed that if it later becomes unreasonable, the injured parties themselves would initiate a 5(a) proceeding: If it becomes exorbitant, the ultimate consumers or their representative, a State Commission, can be relied on to do so. If it becomes preferential or discriminatory, the consumer who is injured may initiate such a proceeding. And if it become so bur-

10 No doubt this is the explanation for the provision in Section 5(a) that when an existing rate has been found unreasonable after a hearing under 5(a) the Commission may itself fix a *lower* rate, but may not fix an *increased* rate except in accordance with a filed rate proposed by the company. It is only the company itself which can propose a rate producing less than a fair rate of return. Such a rate, if fixed by the Commission, could be set aside as confiscatory. Thus this provision leaves the door open for the company to file a rate producing less than a full return if it is willing to do so, thereby preserving the consumers' right to the "*lowest* reasonable rates," as required by the last words of Section 5(a).

densome as to endanger the utility's ability to perform its public duties, the Commission can readily be advised of this fact, and can initiate a proceeding on its own motion."[11]

When it is borne in mind that it is only if the public interest so requires that a private contract can be abrogated at all these provisions fit logically into place, in accordance with well settled principles of rate regulation. It is well established that the public interest does not require a company's stockholders to be bailed out of a contract entered into by the company's management simply because it proves to be less profitable than anticipated. For example, in *Arkansas Natural Gas Co.* v. *Arkansas Railroad Comm. et al.*, 261 U. S. 379 (1923), this Court was confronted with a contention that it was the duty of a public utility commission to abrogate a contract if it was shown that the rate provided thereunder was inadequate, even though there was no showing that the public interest was involved or that the effect of the low rate would be either to place an undue burden upon other customers or to impair the ability of the company to fulfill its public functions. While the case was decided on the basis of a provision of an Arkansas statute which forbade the State Commission to abrogate existing contracts, Mr. Justice Sutherland, writing for a unanimous court, said:

> "The question whether, in the absence of the statute—it being made to appear that the stipulated consideration was grossly inadequate—the commission, under the circumstances disclosed by the record, would have been under a duty to fix gate rates in contravention of the contracts, may be put aside with brief consideration. While a State may exercise its legislative power to regulate public

11. Practical examples of how State Commissions which recognize the validity of contracts under similar statutes have met this problem will be presented in the brief to be submitted in the *Sierra* cases.

> utilities and fix rates, notwithstanding the effect may be to modify or abrogate private contracts (*Union Dry Goods Co.* v. *Georgia Public Service Corp.*, 248 U. S. 372, 375; *Producers Transportation Co.* v. *Railroad Comm.*, 251 U. S. 228, 232) there is, quite clearly, no principle which imposes an obligation to do so merely to relieve a contracting party from the burden of an improvident undertaking. The power to fix rates, when exerted, is for the public welfare, to which private contracts must yield; but it is not an independent legislative function to vary or set aside such contracts, however unwise and unprofitable they may be. Indeed the exertion of legislative power solely to that end is precluded by the contract impairment clause of the Constitution. The power does not exist *per se*. It is the intervention of the public interest which justifies and at the same time conditions its exercise." (261 U. S. 379 at 382-3)

It follows that there is no need to give a natural gas company the power to initiate a proceeding designed to abrogate its own contract simply because it is costly to its stockholders. If the public interest is adversely affected by the contract the members of the public have ample power to complain to the Commission and the Commission, as the guardian of the public interest, has ample power, as well as a clearly defined duty, to protect that interest.

Nor is there any substance to the contention that it would impose an "intolerable burden" on the Commission to require it to pass on the reasonableness of a contract before it can be set aside. As suggested in the *Armour* case, *supra*, the existence of contracts gives stability to the industry, and decreases, rather than increases, the number of rate changes which must be "processed" by the Commission.

II

An attempt by a natural gas company to change a contract rate by filing a schedule of new rates under Section 4(d) over the objection of the purchaser, being unauthorized by the Act, must be rejected by the Commission.

If, as we think is abundantly clear from the foregoing discussion, an attempt by a natural gas company to increase a rate embodied in a contract unilaterally by a mere filing under Section 4(d) is unauthorized under the Act, it follows that it must be rejected by the Commission as an unlawful filing when objected to by the purchaser. If the Commission accepts the filing, the new rate will automatically become effective either in thirty days or, if suspended, in five months, and can only be rejected after a hearing under Section 4(e). As we have seen, under that section the Commission must approve the new rate, however much it violates the existing contract and however reasonable the contract rate itself might be, provided the proposed new rate is within the "zone of reason."

Petitioners insist that the Commission has no authority to reject a proposed change of rates filed by a natural gas company under 4(d) without a hearing under 4(e). They base this contention primarily on the decision of the Court of Appeals for the Third Circuit in *Mississippi River Fuel Corp.* v. *Federal Power Commission*, 202 F. 2d 899 (3rd. Cir. 1953). We submit that that case is clearly distinguishable. There a gas company filed a schedule of proposed rate increases under Section 4(d) and the Commission, without a hearing of any kind, rejected the filing on the stated ground that it appeared from the supporting data filed with the schedule

that part of the proposed increase was predicated on an anticipated increase in the cost of gas which had not as yet materialized. In other words, the Commission undertook to reject the filing without a hearing, on the ground that the proposed increase was shown by the supporting data to be unjustified and therefore unreasonable. We have no quarrel with the decision of the Court of Appeals that without a hearing under 4(e) the Commission may not reject a proposed increase filed under 4(d) because of any alleged unreasonableness of the *new* rate.[12]

The Court of Appeals recognized in that case that a proposed rate change could be rejected by the Commission if it were not duly filed in accordance with the necessary "formal requirements" (202 F. 2d 899 at 903). But petitioners contend that the illegality of a unilateral filing in violation of a contract under 4(d) would be a "substantive" rather than a "formal" defect, so that, under their construction of this dictum in the *Mississippi River Fuel* case, it could not be rejected on that ground (C. Br. 33-35). We respectfully submit that the doctrine of the *Mississippi River Fuel* case that the Commission is without power to reject a filing under 4(d) without a hearing under 4(e) must be limited to defects in the filing which can be corrected after such a hearing, *i.e.*, the reasonableness of the proposed *new* date. Otherwise, the Act provides no remedy whatever for a filing that is illegal or unauthorized for any reason, "formal" or "substantive", other than the reasonableness of the new rate.

As the Commission may not consider the reasonableness of the existing contract in the hearing under 4(e), it

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12 The Solicitor General's brief, in a footnote on page 37, asserts that the Commission's records show that Mississippi's rates had originally been fixed by contract and that Mississippi proposed to change them by filing a schedule without the purchaser's consent, citing C.A. 3, No. 19868, Jt. App. 4a, 7a. We find nothing in the cited portion of the record, or elsewhere, to support this assertion. But in any event, it is apparent from an examination of the opinion of the Court in that case that the existence of a contract was not considered by the Court in reaching its decision (202 F. 2d 899 (1953)).

follows that this is not a defect which can be corrected upon such a hearing. Accordingly, we submit that it must follow that as soon as the Commission is on notice that the filing is in violation of an existing contract, the filing must be rejected, just as the Commission must have the undoubted power to reject such a filing if it is unlawful for any other reason except the reasonableness of the proposed new rate.

It should be noted also that if the Commission is powerless to reject a filed increase of a rate embodied in a contract for the sale of natural gas for resale for industrial use only, the proposed increase will automatically become effective thirty days after filing, for the Commission has no authority to suspend the effective date of a filed change in rates for resale for industrial use only. Inasmuch as petitioners also argue vehemently that no refund is permissible when there has been no suspension, it follows that, at least until a hearing as to the reasonableness of the new rate has been held and completed—a process which frequently takes several years—the contract would be abrogated even though the proposed new rate itself were ultimately found to be unreasonable.

It is to be borne in mind that the contract proposed to be changed is on file with the Commission, so that the Commission is technically on notice of its existence. Of course, if the purchaser under the contract, having notice of the proposed change, remains silent, the Commission would no doubt be justified in accepting the filing on the assumption that it had consented to the change. But when, as here, a formal objection is filed, the Commission is fully on notice that the proposed filing is unlawful and unauthorized by the Act, and should be rejected.

If it should be argued that it would place a great burden on the Commission to require it to determine whether or not the rate to be changed is embodied in a contract, the

simple answer is that the Commission has ample authority to amend its rules so as to provide that any company filing a proposed change must state whether or not the existing rate is embodied in a contract, and if so, must state whether or not the other party to the contract has agreed to the change.

Thus it is clear that a schedule of rate changes filed under Section 4(d) can and must be rejected by the Commission when it appears that the existing rates are embodied in a duly filed contract and that the proposed change has not been agreed to by both parties to the contract.

III

The overwhelming weight of authority in both Federal and State Courts supports the foregoing construction of the Natural Gas Act.

While we do not believe that the proper construction of the filing provisions of the Natural Gas and Federal Power Acts, now presented to this Court for the first time, can turn upon the citation of innumerable cases from lower courts, nevertheless; petitioners place such emphasis on their contention that the "overwhelming" weight of authority supports their construction citing over 175 Federal and State cases in their two briefs in its support that we must beg the court's indulgence in order to set forth adequately the fallacy of such a claim.

A. This Court has held that under a statute substantially similar to the Natural Gas Act a contract could not be abrogated by a company by the mere filing of a new schedule, in the absence of a finding by the Commission that the contract was against the public interest.

The proposition that under a regulatory statute which recognizes contracts and contains filing and review pro-

visions comparable to those contained in the Natural Gas Act, a filed rate embodied in the contract may be changed by the mere filing of a proposed schedule of increased rates, was squarely presented and rejected by this Court in *Wichita R.R. v. Pub. Util. Comm.*, 260 U. S. 48 (1922). The statute involved in that case, the Kansas Public Utility Law (Session Laws of 1911, c. 238, p. 422 *et seq.*) is in its general structure substantially similar to the Natural Gas Act. Section 11 of the Kansas Law, like Section 4(c) of the Gas Act, requires the filing of all existing rates. Section 20, like Section 4(d), provides that no change in existing rates may be initiated by the company without filing and publishing a schedule showing the proposed changes. The only distinction between that provision and the Gas Act is that under the Kansas statute no proposed change may become effective without the affirmative consent of the Commission, whereas under Section 4 of the Gas Act the rate becomes effective in 30 days unless suspended, and becomes permanently effective after five months of suspension unless affirmatively found unreasonable by the Commission after a hearing under 4(e). Petitioners make much of the fact that Section 20 of the Kansas statute does not provide for a hearing, but as the hearing provided for under Section 4(e) relates solely to the reasonableness of the proposed new rate and not to the reasonableness of the contract rate, this is a "distinction without a difference." Neither statute provides for a hearing or finding as to the reasonableness of an existing contract in a proceeding initiated by the filing of a schedule of new rates, and under both, such a proposed filing becomes effective unless the Commission either fails to approve the new rate, under the Kansas statute, or affirmatively disapproves, under the Gas Act.

Section 13 of the Kansas Law, like Section 5(a) of the Gas Act, provides that:

> "It shall be the duty of the commission, either upon complaint or upon its own initiative, to investigate all rates, * * * and if after full hearing and investigation the commission shall find that such rates * * * are unjust, unreasonable, unjustly discriminatory or unduly preferential, the commission shall have power to fix and order substituted therefor such rate or rates * * * as shall be just and reasonable."

Section 16, like the second half of 5(a), provides that if upon such hearing the rates are found to be unjust, unreasonable, etc., the Commission shall have power to substitute therefor such rates "as it shall find, determine or decree to be just, reasonable and necessary." Thus the regulatory scheme set forth in the Kansas statute is in all essential respects identical with that set forth in the Natural Gas Act.

The *Wichita* case dealt with a contract for the sale of electric power at fixed rates for a term of thirty years. The contract was entered into in 1910 between the Wichita Railroad & Light Company, which operated a street railroad and furnished electric light in the City of Wichita, Kansas, and the Kansas Gas & Electric Company. The following year, 1911, the Kansas Public Utility Law was adopted, and the contract was duly filed with the Kansas Public Utilities Commission in 1914 as required by that statute.

In January, 1918, the Kansas Gas & Electric Company filed a petition with the Public Utilities Commission of Kansas alleging that its existing rates had been confiscatory since 1914 and requesting that an order be issued authorizing it to add certain surcharges. The Wichita Company, the purchaser, appeared in the proceeding, pleading its contract as a bar to the proposed increase.

On April 1, 1918, the Commission, without having held a hearing, issued an order allowing surcharges at lower rates than those requested by the utility, but higher than those provided under the contract.

The Wichita Company, alleging that the order impaired its contract, immediately sought and obtained an injunction from the U. S. District Court restraining the Commission from putting it into effect. The Court of Appeals for the Eighth Circuit reversed[13] (268 Fed. 37 (8th Cir 1920)), but this Court, in a unanimous opinion written by Mr. Chief Justice Taft, reinstated the judgment of the District Court, holding that under the Kansas statute the Commission could not abrogate or modify an existing contract without an express finding that the public interest required such action. 260 U. S. 48 (1922).

In the course of his opinion, the Chief Justice quoted with approval from the decision of the Kansas Supreme Court in *Kaul* v. *American Independent Telephone Co.*, 95 Kan. 1, 147 Pac. 1130 (1915), as follows:

> "* * * The passage of the act did not automatically overthrow contracts, nor set aside schedules of rates which had been agreed upon. Neither did the fact that the defendant published and filed a schedule of rates with the public utilities commission abrogate the contract. In any event, rates previously agreed upon between utilities and patrons will continue in force until the commission has found them to be unreasonable, and has prescribed other rates" (260 U. S. 48, 58 (1922)).

Thus it is clear that under the law of Kansas, which of course was binding on this Court, the statute did not automatically outlaw rate contracts. Nevertheless, the State

13 Primarily on the alleged authority of *Union Dry Goods Co.* v. *Georgia P. S. Corp.*, 248 U. S. 372 (1919), discussed hereinafter at pages 42 to 44.

Commission and the company in that case argued, as the petitioners argue in the present case, that because the company was authorized to file changes in rates under Section 20, which required no finding as to the reasonableness of the existing rates, the contract rate had been effectively increased by the mere filing. To this argument Mr. Chief Justice Taft replied:

> "* * * This construction of §20 [§§4(d) and (e) of the Gas Act] is doubtless correct, but it shows that the filing of a schedule of changed rates under that section cannot accomplish the result of abrogating contract rates. It could not do so any more than would the original filing of a schedule of rates under §11 [§4(c) of the Gas Act] requiring every public utility to publish and file with the Commission all schedules of rates do this. The consent of the Commission in §20 is made necessary only to prevent changing schedules without notice to the Commission and thus to secure a proper supervision of schedules. Such consent does not involve a hearing or a finding and a decision. The section does not, therefore, cover, or measure the essentials of, the proceeding in this case before the Commission which the order shows was upon pleadings and *inter partes*" (260 U. S. 48 at 56-7).

Petitioners make much of the Chief Justice's reference to the absence of a hearing or a finding and decision under Section 20 of the Kansas statute, pointing out that the Gas Act does require a hearing and finding before a proposed rate change filed under Section 4(d) can be set aside by the Commission under 4(e). The short answer to this contention is that, as petitioners themselves repeatedly point out, the hearing provided for under Section 4(e) relates only to the reasonableness of the new rate and does not involve any hearing, finding, or decision as to the reasonableness of the existing rate. It is obviously

the absence of such a finding that the Chief Justice referred to as fatal to the contention that the mere filing could "accomplish the result of abrogating contract rates" (260 U. S. 48 at 56). A hearing and finding as to the reasonableness of the *new* rate would be immaterial and irrelevant.

Petitioners also seek comfort from the fact that the *Wichita* case appears to have been cited most often in support of the proposition that "When * * * an administrative agency is required as a condition precedent to an order, to make findings of fact, the validity of the order must rest upon the needed finding. If it is lacking, the order is ineffective" (260 U. S. 48 at 59). This may be so; but it must be borne in mind that it is only because the Kansas Commission had failed to make the finding of unreasonableness required by Section 13 of the Act, just as in the instant case the Federal Power Commission has failed to make the identical finding required by Section 5(a) of the Gas Act, that this issue was presented to this Court, and it was decided adversely to petitioners' contentions.

In any event, the *Wichita* case is the only decision by any Federal Court dealing with the problem here presented, under a statute which did not automatically abrogate existing contracts. As we have seen, the Supreme Court of Kansas had expressly held in the *Kaul* case, *supra*, that "The passage of the Act did not automatically overthow contracts" (95 Kan. 1 at 4, 147 Pac. 1130 at 1131); just as the Solicitor General has conceded in the present case that contracts were not "automatically abrogated" by the Gas Act (C. Br. pp. 11, 53). Nor has the *Wichita* case ever been overruled or limited in the application of its principles to such a statute. On the contrary, the principles laid down by this Court in that case have been expressly applied to the Gas and Power Acts by the Courts of Appeals of three Circuits before whom the construction

of these Acts has been litigated: the instant case in the Third Circuit, the *Sierra* case in the District of Columbia Circuit (223 F. 2d 605 (1955)) and the case of *Colorado Interstate Gas Co.* v. *Federal Power Commission*, 142 F. 2d 943 (1944), in the Tenth Circuit. We shall not take up the time of the Court to discuss the first two cases, as one is the subject of the present appeal and the other the subject of the appeal to be argued before this Court at the same time. As will appear from the records on those appeals, both Circuits construe the Gas and Power Acts exactly as we do here.

In the *Colorado Interstate* case the Court of Appeals for the Tenth Circuit had under review certain orders of the Federal Power Commission issued after an investigation of existing rates under Section 5(a) of the Natural Gas Act. This investigation had been instituted in part on the complaints of the City and County of Denver and of the Public Service Commission of the State of Wyoming, and in part by the Federal Power Commission itself. The orders under review, among other things, found that the rates and charges embodied in certain existing rate contracts were unreasonable and unjust, and fixed lower rates. The natural gas companies challenged this finding for want of substantial evidence to support it. Although the Court rejected this contention because it found that the record did contain substantial evidence to support the finding, it sustained the right of the companies to raise the issue in the following language:

> "* * * The passage of the Act did not automatically overthrow the contracts into which these companies had previously entered. Neither did it ipso facto set aside the schedules of charges upon which they had agreed. Such rates and charges could be modified only after an express finding of unreasonableness. Wichita R. & Light Co. *v.* Public

> Utilities Commission, 260 U. S. 48, 43 S. Ct. 51, 67 L. Ed. 124; Allen W. Hinkel Dry Goods Co. v. Wichison Industrial Gas Co., 10 Cir., 64 F. 2d 881. And the right of the Commission to make a finding of unreasonableness depends upon the existence of the fact. In the absence of substantial evidence to show that the rates and charges in existence are unreasonable, a finding to that effect constitutes the arbitrary exercise of power by administrative fiat and cannot stand. Interstate Commerce Commission v. Louisville & N. R. Co., 227 U. S. 88, 33 S. Ct. 185, 57 L. Ed. 431." (142 F. 2d 943 at 954)

Petitioners attempt to distinguish this case on the ground that it arose in a proceeding under 5(a). Apparently they would write into the Tenth Circuit's opinion, following the words "[s]uch rates and charges could be modified only after an express finding of unreasonableness" the words "except that they may be modified at any time by the company itself by the mere filing of a schedule of higher rates under Section 4(d)." But that is not what the Court said and we submit that it could not have properly said so.

As there is no substantial distinction between the *Wichita* case and the case at bar, we submit that, if authority is necessary to support the construction of the Natural Gas Act which we have hereinabove set forth, this case furnishes such authority and is controlling.

B. The petitioners do not cite a single case which detracts from the binding effect of the *Wichita* case.

Both petitioners cite many cases which arose either under the Interstate Commerce Act or under State statutes regulating railroads. As we think is clear from our discussion of the *Armour* case, *supra* (pp. 14-16), such cases have no bearing on the present issue. Concededly, private rate contracts between carriers and shippers or

passengers have been outlawed in the railroad industry by both Federal and State laws.

The cases in this Court most strongly relied on by petitioners, other than the *Armour* case and *Minneapolis, St. P. & S.S.M.R. Co.* v. *Menasha W. W. Co.*, 245 U. S. 633, which deals with the Wisconsin statute regulating railroads, and is identical with the Interstate Commerce Act, are *Union Dry Goods Co.* v. *Georgia Public Service Co.*, 248 U. S. 372 (1919) which United contends is decisive here, and *Midland Realty Co.* v. *Kansas City Power & Light Co.*, 300 U. S. 109 (1937).

The *Union Dry Goods* case is easily disposed of by a mere glance at the order of the Railroad Commission of Georgia (now known as the Georgia Public Service Commission) and the opinion of the Trial Court denying Union's application for an injunction, both of which are printed in full at pages 9 to 46 of the Appendix to United's brief. As there appears, there had been a rate war between two competing power companies in the City of Macon, Georgia. During the course of this rate war contracts at lower and lower rates were entered into by each company for the purpose of holding existing customers or obtaining new customers. Both companies became so weakened by this competition that one finally bought out the other, and then filed a petition to the Commission, stating that its existing rates were non-compensatory and ruinously low and seeking authority to increase them. There was no attempt to put increases into effect unilaterally in advance of Commission action. After extensive hearings the Commission fixed a scale of maximum rates, designed to produce a fair return to the company, and then, reciting that it had given careful attention to the contentions of those who contended their contracts were binding, held that all contracts calling for lower rates "must be abrogated as unlawfully discriminatory,

and made to correspond with the Commission's scale, or the same special rates given to all of the public (App. to U. Br. p. 43)." In explaining its action the Commission stated that after careful consideration it had determined that:

> "To allow them [the contract rates] to stand and to require others of the public to pay higher rates would be rank discrimination; such a condition cannot be allowed to exist. * * * Unlawful discriminations arising out of different rates can only be removed by moving the lower rate up to the higher, or the higher to the lower.
>
> "The rates prescribed herein are in the opinion of the Commission, at this time, just and reasonable. We have no power to compel the company to accept less, except as implied in the power to prevent unlawful discrimination (App. to U. Br. pp. 43-44)."[14]

Thus the Georgia Commission followed precisely the procedure which we advocate here. It found, after a hearing, that existing contracts were discriminatory and therefore unlawful and ordered that those which did not conform with the rate charged to the general public by the company should be abrogated. If any such situation were found to exist here, we would, of course, agree that the contract in question should be set aside. But there is no contention here that United's contract to sell gas to Mobile at 10.7¢ per MCF for resale to Ideal was discriminatory.

Unlike other contract customers, the Union Dry Goods Company had taken no part in the proceedings before

14 This order furnishes a practical illustration of the application of the provision in Section 5(a) of the Gas Act prohibiting the Commission, after a finding that the existing rates are unreasonable, from ordering an increase except in accordance with an increase filed by the company. The Commission can prevent discrimination, but if doing so requires an increase the company must fix the increased rate that will accomplish that purpose. But, of course, the proposed increase is again subject to review by the Commission under Section 4(e).

the Commission but rested on the erroneous assumption that its contract was beyond the regulatory power of the Commission. Accordingly, it refused to pay the higher rates ordered by the Commission. Thereupon the Georgia Public Service Corporation refused to serve it further and the Union Dry Goods Company sought an injunction. Thus in the posture in which the litigation reached the courts, it was clear that the Union Dry Goods Company had not exhausted its remedies before the Commission. It was merely making a collateral attack upon the order of the Commission. Moreover, as the opinion of the Trial Court shows, the basis of its attack was simply that the Georgia statute permitting the Commission to abrogate contracts upon a finding of unreasonableness was unconstitutional because it impaired the obligations of its contract (App. to U. Br. p. 10). This was the sole issue presented and brought to this Court for review and we have no quarrel with the decision of this Court that there was no merit to that contention (248 U. S. 372 (1919)). Thus the *Union Dry Goods* case has no bearing whatever on the issue here presented. The right of the utility itself to increase its contract rates by a mere filing was not involved or even mentioned. The case merely reaffirms the well established proposition that rate contracts are subject to the paramount power of government regulation.

While the opinion of this Court in the *Midland Realty* case (300 U. S. 109 (1937)) may seem upon a casual reading to give support to the petitioners' contentions, upon a more careful reading it will be found that it is of no greater avail than cases arising under the Interstate Commerce Act. To be sure, in that case the Court below had construed the statute (Rev. Stat. Mo. 1929, c. 33, §5121, *et seq.*) as permitting contracts to be abrogated by a mere filing of a schedule of higher rates, and this was attacked as unconstitutional by the Midland Company. But as this Court pointed out:

> "These questions are to be decided upon the construction that the state supreme court put upon the statute. And that law is to be taken as if it declared that rates made in accordance with its provisions shall supersede all existing contract rates." 300 U. S. 109 at 113.

The Court cited a number of decisions of the Supreme Court of Missouri. An examination of the first two cases cited, *Fulton* v. *Public Service Comm.*, 275 Mo. 67, 204 S. W. 386 (1918); *Sedalia* v. *Public Service Comm.*, 275 Mo. 201, 204 S. W. 497 (1918), will show that the Supreme Court of Missouri had concluded that because of "our own peculiar constitutional provision" all existing rate contracts had been outlawed in Missouri (*State ex rel. City of Sedalia* v. *Public Service Comm.*, 275 Mo. 209 at 212, 204 S. W. at 499). The "peculiar constitutional provision" relied on was an amendment to the State Constitution adopted in 1875 providing that "the exercise of the police power of the State shall never be abridged." The Missouri courts concluded that the very existence of a private rate contract would constitute a violation of this provision because it might interfere with the proper exercise of the State's regulatory powers. That this, and not the Court's construction of the statute itself, was the basis of the Missouri courts' position is apparent from the *Fulton* case, *supra*, decided nine days after the *Sedalia* case. There the Missouri court on the authority of the *Sedalia* case, overruled one of its own prior decisions which had recognized the validity of an existing rate contract, but refused to overrule the case of *Sloane* v. *Railroad*, 61 Mo. 24 (1875), on the express ground that "the *Sloane* case was based upon legislation enacted prior to the adoption of the Constitution of 1875" (275 Mo. at 71, 204 S. W. at 386).

We do not agree that the existence of a rate contract can properly be considered as abridging the police power under a statute such as the Gas Act, which itself empowers the Commission to set aside such contracts under Section 5(a) at any time that they are found to interfere with the proper exercise of the State's police power. But we are not here concerned with the construction which the Supreme Court of Missouri has placed upon the Missouri Constitution. This Court in considering the issues before it in the *Midland* case (300 U. S. 109), was bound by the decisions of the highest court of that State that under its constitution, private rate contracts had been outlawed, just as the Interstate Commerce Act outlaws rate contracts in the railroad industry. Accordingly, the *Midland* case has no more bearing here than the *Armour* case (209 U. S. 56).[15]

The only other Federal authority cited by petitioners which seems to have any bearing on the issues here before the Court is a *dictum* of the Court of Appeals for the Fifth Circuit in the recent case of *Tyler Gas Service Co.* v. *United Gas Pipe Line Co.*, 217 F. 2d 73 (5th Cir., 1954). The same proposed increases filed by United which form the basis of the present litigation also purported to increase the rates fixed by a contract between United and Tyler Gas Service Company, a distributing company serving the City of Tyler, Texas, under a franchise agreement with that city. The difference between that case and the present is fundamental: Tyler did not make its objections to United's repudiation of its contract before the Commission, but sought in a collateral proceeding in the United States District Court to obtain an injunction preventing United from increasing its rates in violation of its con-

15. It is also worthy of note that *Midland*, like *Union Dry Goods*, was a collateral attack on an order of the Commission entered in a proceeding in which Midland had not appeared.

tract. The Commission was not even made a party to that proceeding.

That the Fifth Circuit itself recognized that these circumstances clearly distinguished its decision from that of the Third Circuit in the instant case, is apparent from its own opinion:

> "Assuming, without deciding, that the opinion of the majority [in the *Mobile* case] is right, that of Judge Hastie, the dissenting member, is wrong, we think it plain that the opinion does not conflict with, that indeed it supports and confirms, the views of the district judge: that 'Any relief to which plaintiff may be entitled in the premises must be secured through action of the commission and not of this court. The commission is amply empowered to give adequate relief.'; * * *." (217 F. 2d 73, at 78)

With this we are inclined to agree, for it seems to us that the proper procedure for the appellants in the *Tyler* case was to petition the Commission, as *Mobile* did here, to reject the filing of the increased rate because it violated their contract rights. But petitioners rely on the *dictum* of the Fifth Circuit that:

> "* * * the defendant, a public utility, may not by private contract fix binding long term rates either too high or too low, for if too high they would penalize the particular consumers affected, or if too low they might jeopardize the ability to serve the public and in both situations they would be the result of action in contravention, if not in defiance, of the Natural Gas Act, and in particular Section 4 thereof, and of the authority and jurisdiction of the Federal Power Commission." (217 F. 2d 73, at 77)

We agree that a private contract fixing rates so high that they would penalize the consumers affected or so low as to jeopardize the company's ability to serve the public

would be in violation of the requirement of Section 4(a) that all rates "shall be just and reasonable." In such a situation the Commission not only has the power, but the duty, after a hearing under 4(e) at the time the contract is filed, or under 5(a) at any time thereafter, to set the contract aside upon a finding that the contract rate will produce such results. But no such issue is presented on this appeal.

Thus even this *dictum* is not in conflict with the decision below. We know of no case which has either construed the Gas Act in a manner conflicting with the construction placed upon it by the Third, Tenth and District of Columbia Circuits, or casts any doubt upon the correctness of the construction placed upon the substantially identical Kansas Public Utility Law by this Court in the *Wichita* case (260 U. S. 48 (1922)).

C. The majority of cases arising in states whose regulatory statutes do not automatically abrogate private rate contracts sustain the proposition that a filed contract rate cannot be increased by the utility by the mere filing of a new rate schedule.

In support of his oft-repeated assertion that the overwhelming majority of State cases support the contentions advanced in his brief on behalf of the Federal Power Commission the Solicitor General asserts that some thirty States have regulatory statutes in the utility and transportation fields providing for a "filed rate procedure" similar to that provided for in the Natural Gas Act (C. Br. pp. 56, 57 fn. 35). We concede that this may be the fact, but are at a loss to perceive its significance in this case. The sole question at issue here is whether under such a regulatory statute the contract rate may be increased by one of the parties to the contract by a mere filing of a new rate schedule.

An examination of the reported cases arising under State regulatory statutes will disclose that the majority of cases arising under statutes which have been construed by the State courts as not automatically abrogating rate contracts hold that such a contract can only be set aside by the Commission upon a finding of unreasonableness, and that it cannot be abrogated by the mere filing of a new schedule.

The Majority View

Virginia. In *Commonwealth* v. *Shenandoah River Light & Power Corp.*, 135 Va. 47, 115 S. E. 695 (1923), the Supreme Court of Virginia, in holding that a contract rate cannot be abrogated by the mere filing of a new rate schedule, said:

> "To hold otherwise would enable one of the parties bound by a contract to evade its obligations without cause assigned or shown and thus to accord to such action the sanction which can only be accorded to action by the State after cause has been shown." (135 Va. at p. 73, 115 S. E. 702-703)

Rhode Island. The U. S. District Court for the District of Rhode Island, in *Attleboro Steam & Electric Co.* v. *Narragansett Electric Lighting Co.*, 295 Fed. 895 (1924), rejected the contention that under the Rhode Island Statute a contract rate could be increased by a mere filing, saying:

> "It seems evident, however, that the defendant cannot itself exercise the police power of the state to relieve it in the public interest from a burdensome contract.
>
> "Nor can its own judgment be accepted by this court as a sufficient ground for disregarding the contract rights of the plaintiff." (295 Fed. at 904)

Vermont. In *Rutland Ry. Light & Power Co.* v. *Bardith*, 94 Vt. 421, 114 Atl. 582 (1920), the Supreme Court of Vermont said:

> "The only question in this case is whether a public service corporation * * * can of its own motion, and without the consent of its customer, or action on the part of the Public Service Commission, during the term of the contract, change the contract rate to a higher rate * * * by simply filing a schedule of the increased rate with the Public Service Commission." (94 Vt. at pp. 421-2, 114 Atl. at 582)

The Court concluded that the company could not, saying, at p. 423:

> "All such contracts are made subject to the proper exercise of this [the State's] power; but the parties to the contract are bound by its terms until they are lawfully modified. Neither party can of his own motion modify the contract, by increasing or diminishing the rates; for that would be the exercise of the police power by a party to whom such power was not delegated. * * *"

Maine. The Supreme Judicial Court of Maine, in *Re Searsport Water Co.*, 118 Me. 382 at 393, 108 Atl. 452 at 458 (1919), stated that:

> "A utility cannot repudiate such a contract at will. Nor does the filing of new schedules under section 28 have the effect of changing the rates fixed by the contract."

The opinion in each of the cases hereinabove cited also pointed out, of course, that the rate could be changed by the Commission itself upon a proper finding of unreasonableness.

Kansas. We have seen from the discussion of the *Wichita* case, at pages 35 to 39, that the same rule applies in Kansas.

Indiana. *Winfield v. Public Service Commission of Indiana*, 187 Ind. 53, 118 N. E. 531 (1918), seems to favor a similar result.

Alabama. In Alabama the rule appears to be that once a contract has been accepted by the Commission, it can not be changed, even by the Commission without the consent of both parties. *Birmingham Electric Co. v. Alabama Public Service Comm.*, 233 Ala. 675, 173 So. 19 (1937).

The Minority View

The Solicitor General cites cases from eight States which he contends sustain his position: Missouri, Arkansas, Wisconsin, New Jersey, Washington, New York, Colorado, Pennsylvania. Upon examination, it will be found that only the cases cited from Colorado and Pennsylvania sustain the proposition for which they are cited.

Missouri. As we have seen, at pages 44 to 46 above, the *Midland Realty* case is based upon the State court's holding that under the Missouri Constitution all private rate contracts are invalid.

Arkansas. An examination of the case of *Harrison Electric Co. v. Citizens' Ice & Storage Co.*, 149 Ark. 502, 232 S. W. 932 (1921) will show that the Supreme Court of Arkansas construed its utility statute as being identical with the Interstate Commerce Act and therefore governed by such cases as the *Armour* case, *supra*.

Wisconsin. *Minneapolis, St. P. & S.S.M.R. v. Menasha W.W. Co.*, 159 Wis. 130, 150 N.W. 411 (1914), aff'd 245 U. S. 633 (1917) dealt with the Wisconsin Act regulating railroads, which, like the Interstate Commerce Act, outlawed all private rate contracts. Moreover, as the Solicitor General concedes, Wisconsin draws a sharp distinction between the regulation of carriers and other

utilities, just as Congress did: "approval is required for increases in rates proposed by other utilities" (C. Br. 69).

New Jersey. The Solicitor General cites *New Jersey Suburban Water Co.* v. *Town of Harrison*, 120 N.J.L. 546, 1 A. 2d 61 (1938), in support of the proposition that the State of New Jersey permits the abrogation of contracts by a mere filing. However, as he concedes, that case was reversed, although on other grounds (122 N.J.L. 189, 3 A. 2d 623 (1939)), so that the point in issue here has never been passed on by the highest Court in New Jersey. Moreover, the Solicitor General overlooks the case of *Hackensack Water Co.* v. *Board of Public Utility Commissioners*, 96 N.J.L. 184, 115 Atl. 528 (1921), which indicates that the New Jersey utility involved considered it necessary to file an application with the New Jersey Commission to determine whether the contract rate was unjust or discriminatory before it could increase the rate.

Washington. In *North Coast Power Co.* v. *Public Service Comm.*, 114 Wash. 102; 194 Pac. 587 (1921), the Supreme Court of Washington had before it a State statute which in addition to containing filing provisions similar to those contained in Section 4 of the Gas Act, contained a special provision to the effect that "all contracts in force at the date this Act takes effect should remain in force," subject only to the power of the Commission in its discretion to order such contracts abrogated. The Commission had construed this provision as requiring such affirmative action by it before the rates in any contract, including a contract entered into *after* the adoption of the Public Service Commission Law, could be increased. The Supreme Court of Washington held that the provision requiring affirmative action by the Commission before contracts could be set aside applied only to contract entered into before the adoption of the statute and that therefore contracts entered into thereafter were subject to the right of

the company to increase the rates when necessary in order to enable it to render sufficient service, subject only to the right of the Commission to set aside the proposed increases if they were found to be exorbitant. In other words, the Court held that because the statute expressly provided that only pre-existing contracts could not be set aside without affirmative action by the Commission, contracts subsequently entered into were not so protected.

New York. The Solicitor General makes much of the cases of *Town of North Hempstead* v. *Public Service Corporation*, 231 N. Y. 447, 132 N.E. 144 (1921) and *Public Service Comm.* v. *Pavilion Natural Gas Co.*, 232 N. Y. 146, 133 N.E. 427 (1921) but he overlooks the fact that it was only with the greatest reluctance that the Court of Appeals upheld the right of a public utility to increase rates established by a franchise with a municipality by a mere filing, for as it said in the North Hempstead case:

> "This method of increasing rates without first obtaining an adjudication as to their reasonableness may appear * * * 'defective and illogical, * * *'" (231 N. Y. at 451, 132 N.E. at 445).

He also overlooks the fact that in *Matter of Dry Dock, E.B. & B.R.R. Co.*, 254 N. Y. 305 172 N.E. 516 (1930) the same Court refused to follow those cases. In that case, Judge Lehman, writing for a unanimous Court, called attention to the reluctance with which the Court had reached its decisions in the *Hempstead* and *Pavilion* cases, and continued:

> "Certainly we may not strive, by forced constructions of the language of the statute, to find a legislative intent to authorize a method which 'may appear defective and illogical.'" (254 N. Y. at 313, 172 N.E. at 519)

The Court then limited the *North Hempstead* and *Pavilion* cases to the precise circumstances under which they arose.

and refused to permit the contrac rate involved in the *Dry Dock* case to be increased by a mere filing.

Colorado. Concededly, the two cases cited by the Solicitor General (*City of Lamar* v. *Town of Wiley*, 80 Colo. 18, 248 Pac. 1009 (1926) and *Denver & So. Platte Ry. Co.* v. *Englewood*, 62 Colo. 226, 161 Pac. 151 (1916) hold that under the regulatory statute existing in Colorado a contract rate may be increased by a mere filing of new rate schedules. But we find it difficult to understand these decisions, in view of the decision of the same Court in *Ohio and Colorado Smelt. & R. Co.* v. *Public Utilities Commission*, 68 Colo. 137, 187 Pac. 1082 (1920), which was decided shortly after the *So. Platte* case and before the *City of Lamar* case. In that case a power company filed a petition with the Public Utilities Commission asking permission to increase its contract rates on the ground that they were confiscatory. The Commission, after hearing, held that the contract rates were discriminatory, set them aside, and ordered increases. The Supreme Court of Colorado reversed the Commission on the ground that the evidence did not support the finding that the rate was preferential and discriminatory, saying:

> "The sole reason for holding that the power rests with the Commission to increase or decrease a rate stipulated in a contract * * * is that the public welfare demands it in the specific case.
>
> "Therefore the Commission, with the delegated legislative power of the State, must determine that the rate fixed in the contract is detrimental to the public weal. This is the exercise of a very grave and dangerous power and should be asserted with the greatest caution, and by means of every instrumentality at the command of the Commission, to determine with reasonable certainty that the rate fixed in the contract injuriously affects the public welfare." (68 Colo. 137 at 147, 187 Pac. 1082 at 1086)

We find it difficult to reconcile these well-recognized and indisputable principles with the same Court's decisions in the two cases cited by the Solicitor General, which ruled that an existing contract could be abrogated by the utility company itself by a mere filing of new schedules and without any finding by the Commission that the contract "injuriously affects the public welfare."

Pennsylvania. Concededly, the two cases cited from the State of Pennsylvania by the Solicitor General sustain the proposition that a rate contract may be changed by the mere filing of a new schedule, without any finding as to the reasonableness of the contract.

It thus appears that at the most, the courts of only two States, Colorado and Pennsylvania, sustain the contentions of the petitioner, and, as we have seen, the position of the Colorado courts on this issue appears somewhat incongruous. On the other hand, a majority of State cases clearly and directly uphold the principles laid down by this Court in the *Wichita* case and by the three Circuit Courts in the cases hereinabove cited (pp. 34 to 40, *supra*).

We might also point out that there are undoubtedly many State Commissions which construe their regulatory statutes in accordance with the principles established by those decisions, so that the issue has never reached a court of law. As will appear in the brief to be submitted in the *Sierra* case, that is the established practice of the California Commission. An examination of the Public Service Reports of Idaho will show that the Commission in that State considered that rates in a contract could only be changed after a hearing and finding that the contracts were unreasonable (*Caple* v. *Interstate Utilities Co.*, PUR 1930 A. at page 18). While we have not searched all of the records of all State Commissions, we think it is a reasonable assumption that the majority of the other State Commissions also recognize that a contract solemnly

entered into for a valuable consideration to sell power at a fixed rate for a term of years is more than a mere scrap of paper.

As indicated in the beginning of this Point, we do not think the citation of authorities from State courts, or even from this Court, when dealing with the construction of State statutes as they have been construed by State courts, is of much assistance in construing the Natural Gas Act. However, we think it must be clear from the foregoing discussion that the repeated statements appearing in the briefs of both petitioners that the "overwhelming" weight of authority sustains their contentions are without foundation.

D. The records of the Commission show that the instant case and the *Sierra* case are the only cases in which the Commission has followed the procedure of permitting contract rates to be increased by merely filing a new schedule, over the objection of the purchaser.

In support of his contention that "the Commission's opinions and orders make clear that it has consistently followed the filed rate procedure in circumstances such as are here involved" (C. Br. p. 35) the Solicitor General cites primarily orders of the Commission entered after a hearing and finding of unreasonableness under Section 5(a), or orders approving increases filed under Section 4(d) which had not been affirmatively objected to by the purchaser. The only orders cited in which the Commission approved such increases over the contract purchaser's objection are the orders in the instant case and the *Sierra* case.

For example, the order of the Commission approving an increase in *City of Detroit* v. *Panhandle Eastern Pipe Line Co.*, 6 FPC 1044 (1947), cited at page 35 of the Solicitor General's brief, merely approved an increase filed pur-

suant to an order of the Commission entered the preceding day after a hearing under Section 5(a), which found existing contracts to be discriminatory. Moreover, the cited order merely continued rate increases which had been previously agreed upon by the parties to the contracts. The proceedings were instituted in 1946-7 after it appeared that Panhandle had entered into contracts calling for the sale of more gas than it was physically able to deliver over its pipe line. After elaborate hearings before the Commission under Section 5(a), emergency rules and regulations apportioning available gas among the purchasers holding contracts were ordered by the Commission, with the approval of all of Panhandle's utility customers. (*City of Detroit* v. *Panhandle Eastern Pipe Line Co.*, 5 FPC 983 (1946)). One of the methods of correcting Panhandle's gas shortages approved by this order embodied the acceptance of an offer by one of Panhandle's contract customers, Ohio Fuel Gas Company, to give up its contract right to 20,000 MCF of gas per day, in consideration of a payment to it of 4½¢ per MCF for the amount released. The reason for this proposal was that Ohio Fuel was in a position to obtain an equivalent amount of gas from the Big Inch line of Texas Eastern Transmission Corporation, with which it was also connected, but at a rate which was 4½¢ per MCF higher than the rate under which it could obtain the same gas under its contract with Panhandle. In order to take advantage of this offer, the interruptible customers of Panhandle, whose supplies of gas would be the first to be cut off in view of Panhandle's shortage, agreed to pay this additional amount over and above the rate provided in their contracts for the gas furnished them by Panhandle, and this increase was embodied in the order (*City of Detroit* v. *Panhandle Eastern Pipeline Co.*, 6 FPC 119 (1947)).

The following year, 1947-8, it became impossible to obtain a general agreement among all of Panhandle's

customers. Accordingly the Commission again entered into hearings under Section 5(a), in an effort to find a solution of the emergency. On November 25, 1947, the Commission issued a long opinion and order stating that as a result of its extended hearings the Commission had found that "* * * during the existing emergency gas shortage situation the Panhandle rate schedules now on file * * * are * * * unjust, unreasonable, unduly discriminatory and preferential in violation of Section 4(b) of the Natural Gas Act." The Commission then found that:

> "The authority of the Commission to prescribe the emergency rules and regulations as classifications, rules, regulations or practices, in connection with a rate schedule, to prevent discrimination under section 5(a) of the Natural Gas Act, is fully sustained by the decision of the United States Supreme Court in the case of *Interstate Commerce Commission* v. *Illinois Central Railroad Company*, 215 U. S. 452, where analogous authority of the Interstate Commerce Commission was brought into question." (6 FPC 196, at 204 (1947))

The Commission staff and Panhandle had presented various plans to solve this problem, which involved certain rate increases. The Commission, however, rejected these plans, saying:

> "However, this method of enforcement would appear in this case to involve an increase in rate. Under section 5(a) of the Natural Gas Act the Commission is prevented from ordering any such increase in the absence of the filing of a new schedule providing for the increase." (6 FPC 196 at 216 (1947))

On the following day the Commission issued the order on which the Solicitor General relies (*City of Detroit* v. *Pan-*

Panhandle Eastern Pipe Line Co., 6 FPC 1044 (1947), approving a schedule of increased rates filed by the company embodying the 4½¢ increase which the interruptible customers had agreed to for a previous period. Obviously, the increase was made after hearings and findings under 5(a). True, the filing of the increased rate was made under Section 4(d), but that is just what is contemplated by the provision of Section 5(a) that *after* an existing rate or contract has been found to be unreasonable no *increase* can be ordered except in accordance with a rate filed by the company itself. The contract having been set aside by the Commission under 5(a), the company was free to file the schedule of increases under 4(d) and had no choice but to do so, as the existing rates had been found unreasonable, discriminatory and preferential.

Panhandle Eastern Pipe Line Company, 9 FPC 443 (1950), also cited by the Solicitor General, relates to the same general problem. The Commission's authority to make orders limiting the amount of gas to be delivered to contract customers under Sections 4 and 5 of the Natural Gas Act was challenged and the Commission correctly asserted that it had such power. There can be no doubt of the Commission's power to make such orders after appropriate hearings and findings under 5(a).

The Solicitor General concedes that in *Re Mississippi River Fuel Corp.*, 2 FPC 170 (1940), the purchaser had agreed to the increase. He says that nevertheless it shows that, as far as the Commission was concerned, the Commission "made no distinction between changes sponsored by the gas company alone and those agreed to by the purchaser" (C. Br. pp. 36-37). We think it shows simply that the Commission recognized the right and duty of the company to file proposed changes which had been agreed to by the purchaser, under Section 4(d). The same comment is applicable to most of the other cases

cited on pages 36 and 90 of the Commission's brief. The Solicitor General at page 90 argues that the reason the purchasers did not object was that "the purchasing company accepted without question the propriety of the Commission's following of that procedure." We think it must be obvious that where a purchaser does not object to an attempt by the company to increase a contract rate in reliance upon which the purchaser has made substantial commitments, the reason is that the proposed increase has previously been negotiated and agreed to between the parties to the contract. But in any event, none of these cases deals with a situation where the purchaser affirmatively objected to the increase, as did Mobile in the instant case and Sierra in the *Sierra* case, so that the issue here presented was not raised in those cases.

That the Commission itself as recently as October 30, 1948, recognized that valid rate contracts were permissible under the Natural Gas Act and could be changed only by agreement of the parties, is also apparent from the Commission's Order No. 144 promulgated on that date, quoted in footnote No. 6, on pages 5-6 of United's brief. As heretofore indicated, the purpose of the regulations made effective by that order was to require that all effective rate schedules and contracts providing for payment on a percentage basis should be restated in dollars or cents per unit, without affecting any change in the resulting rates. Section 154.85 of the new regulations provides that, except as required by the conversion provisions:

> "Each contract, which is now filed as an effective rate schedule, may be continued in effect and shall be construed as an executed service agreement * * * until such contract expires by its presently provided terms or is replaced by an executed service agreement in a form contained in the tariff. * * * *Provided, further, however*, That agreements in-

tended to effect a change or amendment in such contract may be made only by the execution of a form of service agreement contained in the tariff."

That the Commission itself recognized that valid rate contracts were permissible both under the Act and under that Regulation is apparent from its own construction of the effect of the regulation:

> "The regulation neither requires that existing contracts remain in effect nor that they be changed. It is permissive only." (Federal Power Commission Order issued December 21, 1948, CCH Utilities Law Reporter, Federal Transfer Binder, 1947-1951 Decisions, ¶9090.)

Thus it is entirely incorrect to assert, as both petitioners repeatedly do assert, that the Federal Power Commission has consistently treated contracts as voidable at will by a gas company by unilateral action under the filing procedure provided for in Section 4(d). On the contrary, it is clear that until the instant case and the *Sierra* case were presented before it, the Commission has at all times recognized that private rate contracts for the sale of natural gas were valid and binding between the parties, and in the absence of Commission action could be modified only by agreement between the parties.

IV

There can be no doubt of Mobile's right to recover the excess charges unlawfully collected by United under the Commission's order.

United devotes some nine pages of its brief to establishing the proposition that the refund provisions of Section 4(e) of the Act are not applicable to rate increases instituted by a filing under Section 4(d) unless the effective date of the increases has been suspended by the

Commission under 4(e). We submit that this is a strained and highly illogical construction of the provisions of Section 4(e). An examination of the section will show it can be equally well construed as permitting refunds in all cases where a filed rate is rejected by the Commission as unreasonable after it has become effective, regardless of whether that occurred in thirty days or five months after it was filed. We can see no possible reason for holding that Congress intended to permit a company to charge exorbitant or illegal rates, without any obligation to refund the excess when the rate has been duly found to be illegal, simply because the effective date was not or could not be suspended, in the absence of unequivocal language requiring such a construction.

But in any event, we think the Court below was correct in holding that it was unnecessary to pass upon this question in view of the fact that the order permitting the increase to go into effect was void, and that therefore "any moneys, if any, collected on the basis of the erroneous order were unlawfully collected and should be returned to Mobile" (A. 155).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment below should be affirmed.

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